



THE STATE
of **ALASKA**

GOVERNOR MICHAEL J. DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

1031 West Fourth Avenue, Suite 200

Anchorage, AK 99501

Main: (907) 269-5100

Fax: (907) 269-5110

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Via Email and US Mail

The Honorable Cathy Giessel
Alaska Senate
1500 W. Benson Blvd.
Anchorage, AK 99503
Sen.Cathy.Giessel@akleg.gov

Re: Alaska Hire Law

Dear Senator Giessel:

Thank you for your October 22, 2019, letter. Be assured that both the Governor and I share your desire to see Alaskans hired and working for businesses in Alaska, including, but not limited to, on public works projects. The point of my October 3, 2019, formal Attorney General Opinion on Alaska Hire (AS 36.10.150) was in no way an indication of the Governor's or my lack of support for the hiring of Alaskans.

My Opinion was a simple and straightforward recognition of the fact that the United States and Alaska Supreme Courts—representing the third branch of government that you reference—have on three separate occasions struck Alaska Hire laws down as unconstitutional under either the Privileges and Immunities Clause of the United States Constitution or the Equal Protection Clause of the Alaska Constitution. During the “six decades” that you reference, the Alaska Hire law was struck down as unconstitutional in 1978, 1986, and then again in 1989. Contrary to your statement that “Alaska’s local hire laws have been tested and refined through the judicial process,” in point of fact each time that an Alaska Hire law has been challenged in court it has, without exception, been ruled unconstitutional under both the federal and state constitutions.

I took an oath of office to support and defend the Constitutions of the United States and of the State of Alaska and to “faithfully discharge my duties as Attorney General to the best of my ability.”¹ This same duty is set forth in the statutes enacted by the Alaska Legislature—“The Attorney General shall . . . defend the Constitution of the State of Alaska and the Constitution of the United States of America.”² Nowhere in law is the Attorney General charged with a duty to

¹ Alaska Const. art. XII, § 5.

² AS 44.23.020(b)(1).

defend every statute, however plainly unconstitutional it may be. The Alaska Supreme Court has recognized that the Attorney General retains “discretionary control over the legal business of the state, both civil and criminal, includ[ing] the initiation, prosecution and disposition of cases.”³

Under the Privileges and Immunities Clause, because the Alaska Hire law burdens the rights of nonresident U.S. citizens to pass into Alaska and engage in lawful employment, Alaska must have a “substantial reason” to justify the burden it places on nonresidents—*i.e.*, Alaska must have a substantial reason to justify the discriminatory burden that the law places only on nonresidents. One aspect of that “substantial reason” must be a showing that nonresidents “constitute a peculiar source of the evil at which the statute is aimed”⁴—this would entail showing that the peculiar source of the high unemployment rate of Alaska residents is the employment of nonresidents in Alaska. Even if the State were able to demonstrate a “substantial reason” for discrimination against nonresidents, the State would then have to show that the law was properly tailored to do something other than simply grant Alaska residents a flat employment preference—a local hiring preference for all Alaskans, as opposed to only unemployed Alaskans, and that applies to all businesses performing public construction work in Alaska, is overbroad and lacks the close tailoring mandated by the Privileges and Immunities Clause.

In this regard, several things are conclusive in determining that the Alaska Hire law is unconstitutional. First, the Alaska Supreme Court has previously ruled that regardless of the important goal of providing employment opportunities within economically distressed areas (here arguably the entire State of Alaska), the underlying objective of economically assisting one class (residents) over another class (nonresidents) “is illegitimate.”⁵ The primary purpose of the Privileges and Immunity Clause is “to help fuse into one Nation a collection of independent, sovereign States”⁶ and to establish “a norm of comity between citizens of separate states.”⁷ It is plain from controlling case law that simply trying to favor residents over nonresidents is illegitimate.

Second, the State cannot show that nonresidents are a peculiar source of any high unemployment of Alaskans. The “zone of underemployment” language contained within the statute, as well as the Department of Labor’s determination that the entire state constitutes a “zone of underemployment,” do not save the law. The Alaska Department of Labor and Work

³ *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950 (Alaska 1975).

⁴ *Hicklin v. Orbeck*, 437 U.S. 518, 525–26 (1978); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

⁵ *State, By and Through Departments of Transp. and Labor v. Enserch Alaska Const., Inc.*, 787 P.2d 624, 634 (Alaska 1989) (Alaska Equal Protection Clause); *Robison v. Francis*, 713 P.2d 259, 266 (1986) (Privileges and Immunities Clause).

⁶ *Toomer*, 334 U.S. at 395.

⁷ *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975).

Force Development's Resident Hire Report—published and produced to the Legislature pursuant to Alaska Hire⁸—demonstrates this fact.⁹

The Report reflects that nonresidents represent at most 20% of Alaska's total workforce.¹⁰ This percentage drops drastically when analysis is limited to permanent non-seasonal employment. The oil industry employed only 5.1% of all nonresident workers in Alaska and the Construction industry employed only 17.9% of all nonresident workers.¹¹ The seasonal seafood processing and leisure and hospitality industries employ the vast majority of nonresident workers in Alaska. And there is no evidence to support the idea that Alaskan workers with necessary qualifications and skills are being passed over for permanent employment in Alaska in any significant numbers in favor of nonresident workers. To the contrary, the Resident Hire Report demonstrates that the jobs filled by nonresidents are almost uniformly those involving "high seasonality, a need for specialized skills, or remote worksites."¹² Employers are hiring Alaskans, and only hire nonresidents when constrained by the realities of the Alaska labor market.

The Alaska Constitution, Article I, Section 23 does not save Alaska Hire from its unconstitutional demise. That constitutional provision specifically acknowledges, as it must under the Supremacy Clause of the United States Constitution,¹³ that the granting of preferences to residents over nonresidents is allowable under the Alaska Constitution only "to the extent permitted by the Constitution of the United States." The Alaska Constitution is always subservient to the United States Constitution. As such, Privileges and Immunities analysis under the federal Constitution drives and controls any constitutional analysis of the Alaska Hire law.

Between 1989—when the Alaska Supreme Court last deemed part of Alaska Hire as unconstitutional—and the present, no past administration was confronted with the constitutional infirmities of the current Alaska Hire law or was presented with the question of whether to defend it in court. The recent legal challenge by Colaska sparked my current legal analysis. It was former Alaska Attorney General, Michael C. Geraghty, who brought the current legal challenge against the law on behalf of Colaska. Obviously, former Attorney General Geraghty is of the opinion that the Alaska Hire law is unconstitutional.

⁸ AS 36.10.130.

⁹ Dep't of Labor & Workforce Dev., Non-Residents Working in Alaska: 2017 (Jan. 2019) ("Resident Hire Report").

¹⁰ *Id.* at 1.

¹¹ *Id.* at 5.

¹² *Id.* at 2.

¹³ U.S. Const. art. VI, cl. 2.

Across the country local hire laws have been nearly uniformly struck down as unconstitutional by both state and federal courts. This area of constitutional law is what is commonly referred to in legal circles as “settled.”¹⁴

You are correct that the Department of Law has from time to time reviewed action taken by the legislature and found it to be wanting under the Alaska Constitution. The Attorney General serves as legal advisor to the Governor and to the various executive branch agencies, and I am authorized by statute to both represent the state in legal actions—like the Colaska matter—and to provide legal opinions and advice on law. In carrying out these duties, the Department may from time to time find constitutional flaws with certain legislative actions. It is not a step we take lightly. Please know that the Department of Law respects the work of the legislative branch and the legislators who serve in it.

In closing, be assured that Governor Dunleavy and I both support the hiring of Alaskans and encourage businesses operating in Alaska to hire qualified Alaskans. Unfortunately, neither the United States nor Alaska Constitutions permit Alaska to mandate that businesses operating in Alaska hire Alaskans in preference over nonresidents by force of law and legal penalty. We trust that you honor and respect our controlling constitutional law, as established by our federal and state judiciaries, as much as we do.

Sincerely,



Kevin G. Clarkson
Attorney General

cc: Representative Bryce Edgmon
Senator Click Bishop
Senator Bert Stedman
Senator Gary Stevens
Senator Natasha von Imhof
Suzanne Cunningham, Legislative Director, Governor's Office
Ben Stevens, Chief of Staff, Governor's Office
Megan Wallace, Director of Legal Services, Alaska Legislative Affairs Agency

¹⁴ The only court in the country that has upheld a local hire law against constitutional challenge is the Wyoming Supreme Court in *State v. Antonich*, 694 P.2d 60 (Wyoming, 1985). But, that decision stands today only because it was not appealed to the United States Supreme Court where it most assuredly would have been overturned under the authority of *Hicklin*, 437 U.S. at 525–26.